IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 215

TOVREA PACKING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

DENISON KITCHEL,
Attorney for Petitioner.

July 3, 1940.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Tovrea Packing Company, respectfully prays that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit enforcing an order of the National Labor Relations Board.

Opinion Below

The opinion of said Circuit Court of Appeals is reported in 111 Fed. (2d) 626 in a proceeding entitled *National Labor Relations Board* vs. *Tovrea Packing Company* (R. 532-544). The order of the National Labor Relations Board, enforcement of which was granted, is reported in 12 N. L. R. B. 1063 (R. 61-108).

Jurisdiction

The decree of the Circuit Court of Appeals was entered on April 30, 1940 (R. 544-548). Petition for rehearing filed on May 15, 1940, was denied on June 20, 1940 (R. 548-549). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (43 Stat. 938; 28 U. S. C. A. Section 347).

Question Presented

The sole question presented by this petition is one of the proper interpretation of the term "agricultural laborer" as used in Section 2(3) of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A. Section 151 et seq.). This section is set forth in the appendix to this petition.

Statement of Fact

One of the principal agricultural pursuits carried on in the State of Arizona is the feeding of livestock (R. 116). The major portion of this livestock feeding is done in the irrigated Salt River Valley in which the City of Phoenix, Arizona, is located. It is estimated that an average of approximately 100,000 head of livestock are fed annually in the Salt River Valley (R. 116-117). The purpose of livestock feeding is to improve the quality of the meat and insure a higher market price (R. 117). The operation, as compared with range grazing of livestock, consists of concentrating livestock in special feeding pens for periods of time averaging four or five months in length and there feeding them special feed and combinations of feed, such as chopped hay, hegira ensilage, cotton seed meal, cotton seed hulls, barley, and molasses in varying quantities. All of these feeds, with the exception of molasses, are raised in the Salt River Valley (R. 118-120, 124-252). The nature of this process, its purpose, the manner of conducting it

and the character of the work performed by those employed are substantially the same in all feeding operations in the valley, irrespective of by whom or where they are conducted (R. 118-252).

Petitioner is engaged in the meat packing business. It maintains a packing plant in the neighborhood of Phoenix, Arizona, where it slaughters and processes livestock (R. 187-188). Petitioner is also engaged in the business of feeding livestock. These feeding operations are carried on at five different locations in the vicinity of Phoenix, Arizona, the feedlots of four of these units of petitioner's feeding operations being located on ranches somewhat removed from the packing plant and the feedlots of one unit being located adjacent to the plant (R. 189). This petition raises the sole question of whether or not individuals employed as livestock feeders in the feedlots adjacent to petitioner's packing plant are agricultural laborers within the meaning of that term as used in Section 2(3) of the National Labor Relations Act.

The sources of the livestock fed in all five units of petitioner's livestock feeding operations are the same. Livestock are interchanged between the five units. The sources of the feed used at all five units are the same. The nature of the fattening process carried on at all five units is the same. The condition of the livestock, the size and structure of feed pens, and the methods and purpose of feeding are the same at all five units and are identical to those at all other livestock feeding operations in the Salt River Valley. The character of the work performed by persons employed in all livestock feeding operations is agricultural. Migratory labor working at rates of pay prevalent for farm labor is employed (R. 114-252).

The feeding operations carried on by petitioner in the feedlot adjacent to its packing plant are separate and distinct from the operations of the plant. These feedlots have their own foreman. Persons employed are hired by a different employment agent than the one who hires indi-

viduals for work in the plant. There are no transfers of employees between these feedlots and the plant and there are no duties common to employees in the two operations (R. 232-233). The number of head of livestock in the feedlots adjacent to the plant is not dependent on the number of head slaughtered in the plant (R. 233). Forty per cent of the livestock fed in the feedlots adjacent to the plant are not processed in petitioner's plant, but are sold and shipped elsewhere on the hoof (R. 233). The livestock slaughtered in petitioner's packing plant are obtained from both petitioner's feedlots and from the feedlots of others (R. 188). Forty-six per cent of the livestock slaughtered in the plant are obtained from feedlots other than those of petitioner (R. 189).

All of petitioner's feedlots including those adjacent to the packing plant are separate and distinct in function and operation from the retaining corrals adjoining the plant where fattened livestock obtained from petitioner's feedlots and the feedlots of others are held for slaughter. These retaining corrals are a part of the plant operation and are similar in function to the stock yards in Chicago, Kansas City, and other large meat packing centers (R. 220).

The National Labor Relations Board has held that nine persons employed by petitioner in the feed lots adjacent to its packing plant were discharged for union activities in violation of Section 8(3) of the National Labor Relations Act, and that they were not agricultural laborers (R. 68-72, 75, 76, 78, 79, 92). It has ordered their reinstatement with back pay (R. 107). The Circuit Court of Appeals has granted enforcement of this order (R. 546).

These men were not employed in the retaining corrals where finished livestock are held for slaughter in petitioner's plant, but were employed exclusively in the feedlots in which petitioner carries on the livestock feeding operations hereinbefore described.

Reasons for Allowing the Writ

In holding on the record in this case that these individuals are not agricultural laborers and that they are within the purview of the National Labor Relations Act (R. 537) the Circuit Court of Appeals has decided that under that Act a laborer who performs agricultural work in furtherance of an agricultural pursuit may, nevertheless, be deemed an industrial rather than an agricultural laborer solely by virtue of the geographical location of his employment or the nature of the principal business of his employer. Petitioner respectfully submits that this raises an important question of federal law which has not been, but should be, settled by this Court. The Circuit Court's interpretation of the term "agricultural laborer" as used in this federal statute is contrary to every judicial interpretation of that term made prior to the decision of the Circuit Court of Appeals in this case. The effect of such interpretation in extending the jurisdiction of the National Labor Relations Board is of obvious national significance. Wherever agricultural work is performed in proximity to and as an incident to an industrial operation, the Board's jurisdiction would extend to all those engaged in the performance of such work. Likewise all workers, irrespective of the geographical location of their employment, engaged in the production of agricultural products which are used in an industrial operation conducted by their employer would, under such an intrepretation, be classified as industrial workers and as such be subject to the Board's jurisdiction. Examples indicating the extent to which this interpretation would extend the jurisdiction of the National Labor Relations Board are set forth in the accompanying brief.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued in the above-named cause, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court on a day to be

designated a transcript of the record in all proceedings had in such cause, to the end that so much of the decree as enforces the order of the National Labor Relations Board directing the reinstatement of persons formerly employed in petitioner's livestock feeding operations may be reviewed and determined by this Court; that said order be set aside and reversed in this one respect, and that petitioner be granted such other and further relief as may be just and proper.

Dated at Phoenix, Arizona, July 3, 1940.

DENISON KITCHEL,
Attorney for TOVREA PACKING COMPANY,
Petitioner.

IN THE

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No. ——

TOVREA PACKING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introduction

The identification of the case below, the basis for invoking the jurisdiction of this Court, and the necessary statements of fact are set forth in the foregoing petition.

Question Presented

The sole question presented by this petition is one of the proper interpretation of the term "agricultural laborer" as used in Section 2(3) of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A. Section 151 et seq.).

ARGUMENT

I. Persons employed by petitioner to feed livestock in feedlots adjacent to its packing plant are agricultural laborers within the meaning of Section 2(3) of the National Labor Relations Act.

There is no dispute anywhere in the record of this case over petitioner's contention that the feeding of livestock is an agricultural pursuit and that the work performed by those employed in the furtherance of that pursuit is agricultural in character. The sole question to be determined is whether the fact that the work is performed in feedlots adjacent to rather than removed from a commercial meat packing plant and the fact that the feeding of livestock is incidental to the operation of the plant in the sense that some of the livestock are slaughtered therein are facts which operate to render these laborers industrial rather than agricultural.

Precedents for judicial interpretation of the term "agricultural laborer" are confined almost exclusively to cases arising under the workmen's compensation statutes of the various states wherein it is a common practice to exclude agricultural laborers from coverage. The American Law Reports contain a series of exhaustive annotations covering these decisions. 7 A. L. R. 1296; 13 A. L. R. 955; 35 A. L. R. 208; 43 A. L. R. 954; 107 A. L. R. 977.

The courts have uniformly held that the character of the work considered in the light of the nature of the enterprise in which it is performed is the determining factor.

Melendez v. *Johns,* 76 Pac. (2d) 1163 (Ariz. 1938);
Ocean Accident & Guarantee Co. v. *Industrial Commission,* 256 Pac. 405 (Utah 1927);
Dowery v. *State,* 149 N. E. 922 (Ind. 1925);
Greischar v. *St. Mary's College,* 222 N. W. 525 (Minn. 1928);
Bates v. *Shaffer,* 185 N. W. 779 (Mich. 1921);

George v. *Industrial Accident Commission*, 174 Pac. 653 (Calif. 1918);
Shafer v. *Parke, Davis & Co.*, 159 N. W. 304 (Mich. 1916);
Vaughan's Seed Store v. *Simonini*, 114 N. E. 163 (Ill. 1916);
Keaney's Case, 104 N. E. 438 (Mass. 1914);
28 *Ruling Case Law* 718, Sec. 11;
71 *Corpus Juris* 376, Sec. 92.

It is respectfully submitted that there are no decisions supporting the proposition that geographical location of employment is an element to be considered.

The position adopted by the Circuit Court of Appeals in the instant case to the effect that the principal business of the employer is controlling has been specifically rejected on several occasions.

Ocean Accident & Guarantee Co. v. *Industrial Commission*, supra;
Dowery v. *State*, supra;
Greischar v. *St. Mary's College*, supra.

The Circuit Court of Appeals for the Ninth Circuit has itself held that under the National Labor Relations Act "the nature of the work modified by the custom of doing it determines whether the worker is or is not an agricultural laborer".

North Whittier Heights Citrus Association vs. *National Labor Relations Board*, 109 Fed. (2d) 76, 80 (cert. denied May 20, 1940, 84 L. Ed. 904).

It has not followed that decision in the instant case where on uncontroverted evidence it appears that the nature of the work is agricultural and there has been no modification by the custom of doing it.

II. The opinion below contains inadvertent misstatements of the record.

The opinion below is extremely misleading because of several inadvertent misstatements of the record. It is essential to a true understanding of the effect of the lower court's decision to refer to the actual facts. The lower court describes petitioner's meat packing business and livestock feeding business with reference solely to the packing plant and adjacent feedlots (R. 533-534). The court then states (R. 535):

> "Respondent is not only in the business just described but operates four cattle feeding ranches."

This statement would indicate that the feeding operations adjacent to the plant and the plant itself constitute a single enterprise while the ranch feed lots constitute a separate business. Such a conclusion is contrary to the facts in the record. The feedlots adjacent to the plant constitute one of five feeding units which altogether comprise petitioner's livestock feeding operations (R. 189).

With reference to the feeding operations on the ranches the lower court makes the following statement (R. 535):

> "A large portion of the cattle food consumed on each one of the ranches is grown thereon or in its vicinity."

If this statement has any significance at all it appears that in making it the lower court has overlooked the fact that a large portion of the feed consumed in the feedlots adjacent to the plant is from the same source and that the sources of the feed in all units of the livestock feeding operations are the same (R. 196 and 222).

The lower court states (R. 535) that "most of the stock fattened on the ranches is not marketed in any way through the packing plant." There is no evidence in the record to support such a statement. There is no evidence as to the

number of cattle fattened on the ranches. There is no direct evidence of the disposition made of the cattle fattened on the ranches. There is evidence, however, that one of the sources of the cattle slaughtered at the packing plant is the ranch feed lots (R. 188). There is also evidence that forty-nine per cent of the cattle processed at the packing plant are fattened in feedlots other than those adjacent to the plant (R. 233) and that fifty-four per cent of the cattle processed at the plant are fattened by petitioner (R. 189). Petitioner respectively submits that on this record it is logical to assume that a major portion of the cattle fattened on the ranches is processed at petitioner's packing plant.

In the same sentence (R. 535) the lower court also states "that most of the stock fattened in the feeding pens adjacent to the packing plant comes to it from sources other than the ranches to which reference has been made." This statement is true. Except for transfers of partially fattened cattle between the various units of respondent's feeding operations, all of the livestock placed in both the ranch feedlots and the feedlots adjacent to the packing plant are unfattened livestock obtained from the ranges of the Southwest (R. 193, 194 and 220).

The rationale of the lower court's opinion appears where reference is made to the unit of petitioner's livestock feeding operations adjacent to the packing plant and the court makes the following statement (R. 536-537):

> "But here we do not have stock raising or feeding as an incident to a stock ranch, nor do we have stock feeding or conditioning as a separate activity, but we do have stock ready for conditioning and fattening confined in relatively small corrals and fed intensively for short spaces of time as an incident to a meat slaughtering and packing industrial enterprise."

The lower court overlooks the fact that in no instance of livestock feeding as that pursuit is portrayed in the record is there such an operation conducted as a part of a business involving the breeding and raising of cattle prior to fatten-

ing for market. All of the witnesses who testified as inde pendent cattle feeders stated that they purchased the stoc for their feeding operations from the ranges of the South west. Petitioner does likewise. The lower court also over looked the fact that these same feeders sell a large portio of their fattened cattle to packers in Phoenix, Arizona, an although their operations might not be termed "an incide to" petitioner's packing plant, the existence of petitioner packing plant may well be the principal reason for the engaging in the livestock feeding business. Furthermor the lower court overlooks the fact that the feeding oper tions carried on by petitioner at its ranch feedlots a neither more nor less "incidental to" petitioner's "me slaughtering and packing industrial enterprise" than a the feeding operations carried on by petitioner at the fee lots adjacent to the plant. Finally, the lower court ina vertently misstates the entire record on this issue wh with reference to the feedlots adjacent to the plant it sa that "we do have stock ready for conditioning and fatte ing confined in relatively small corrals and fed intensive for short spaces of time." The record shows conclusive that the condition of the cattle, the size of the corrals, a the method, purpose and intensity of feeding are identi at the plant feedlots, at the ranch feedlots, and in every fe lot in Arizona.

III. Reasons for allowing the writ.

We have heretofore adverted to the fact that the te "agricultural laborer" had been the subject of judicial terpretation in a great many jurisdictions prior to the en ment of the National Labor Relations Act. It had acqui a definite legal meaning and it will be presumed that C gress in adopting the term understood that meaning intended to use the term in that sense.

Caminetti vs. *United States*, 242 U. S. 472, 27 S Ct. Rep. 192, 61 L. Ed. 442;

United States vs. *Merriam*, 263 U. S. 179, 44 Sup. Ct. Rep. 69, 68 L. Ed. 240;
H. Hackfield & Co. vs. *United States*, 197 U. S. 442, 25 Sup. Ct. Rep. 456, 49 L. Ed. 826.

The lower court in the instant case has adopted an interpretation of the term "agricultural laborer" which is contrary to that recognized legal meaning of the term in holding on the record in this case that the nine individuals involved are not agricultural laborers and that they are within the purview of the National Labor Relations Act (R. 537). The Circuit Court of Appeals has decided that under that Act a laborer who performs agricultural work in furtherance of an agricultural pursuit may, nevertheless, be deemed an industrial rather than an agricultural laborer solely by virtue of the geographical location of his employment or the nature of the principal business of his employer. The mere statement of this proposition indicates the great extent to which the jurisdiction of the National Labor Relations Board would be extended under such an interpretation.

Wherever agricultural work is performed in proximity to and as an incident to an industrial operation the Board's jurisdiction would extend to all those engaged in the performance of such work. It is a matter of common knowledge that throughout the nation it is a customary practice as a matter of convenience for packers of vegetable and citrus products to locate their plants in close proximity to the areas where those products are raised. The same is true of commercial cotton gins and, to a certain extent, of flour mills. There is no doubt that the employees working in such plants are industrial laborers.

North Whittier Heights Citrus Association vs. *National Labor Relations Board*, supra.

Now, however, under the interpretation made by the lower court in the instant case, in each such instance the laborers

engaged in cultivating the soil and raising the crops to be processed or packed in these adjacent plants would also be converted to the status of industrial workers. Their work, although clearly agricultural in character and performed in the pursuit of an agricultural enterprise, is incidental to the industrial operation of packing and processing in the same sense that the work of laborers in the feedlots adjacent to petitioner's packing plant is incidental to the operation of petitioner's plant, i. e., some or all of the products which they produce are packed or processed in the adjacent industrial plants.

Likewise, under the interpretation of the lower court in the instant case, all workers, regardless of the geographical location of their employment, engaged in the production of agricultural products which are used in an industrial operation conducted by their employer would be classified as industrial workers and as such be subject to the Board's jurisdiction. It is a matter of common knowledge that the Ford Motor Company, for example, is extensively engaged in the raising of soy beans which are used in its manufacturing process. Employees engaged in the raising of these soy beans for the Ford Motor Company are, under the lower court's interpretation of the term "agricultural laborers", industrial workers because their employer's principal business is the manufacturing of automobiles. It is also a well known fact that large industrial concerns engaged in the manufacture of rubber products own and operate extensive cotton plantations in the South and Southwest portions of the country. All of the cotton produced is used in their manufacturing process. The effect of the lower court decision in the instant case would be to bring the cotton pickers employed by these concerns under the jurisdiction of the National Labor Relations Board, even though cotton pickers working for other employers in adjoining fields would still be agricultural laborers and without the jurisdiction of the Board.

Additional examples of the universal effect of this interpretation of the term "agricultural laborer" would only serve to elaborate the obvious. If the lower court's interpretation is correct, petitioner estimates that thousands of workers who have heretofore been considered as agricultural and therefore exempt from the provisions of the National Labor Relations Act will be brought under the jurisdiction of the National Labor Relations Board. Petitioner respectfully submits that this raises an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

DENISON KITCHEL,
Attorney for TOVREA PACKING COMPANY,
Petitioner.

APPENDIX

Section 2(3) of the National Labor Relations Act:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include *any individual employed as an agricultural laborer*, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

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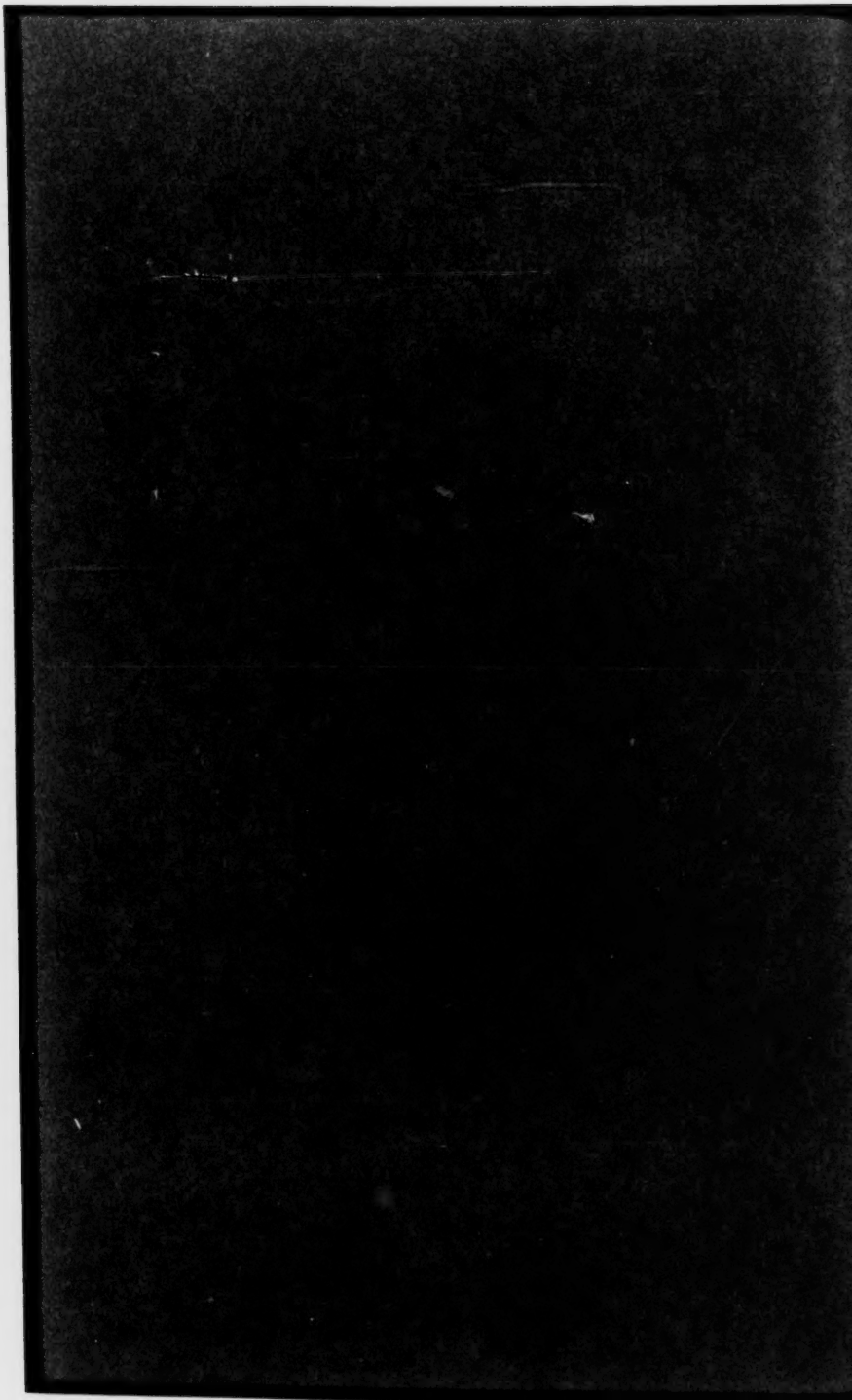
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION



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OPINIONS BELOW

The opinion of the court below (R. 532–543) is reported in 111 F. (2d) 626. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 61–108) are reported in 12 N. L. R. B. 1063.

JURISDICTION

The decree of the court below (R. 544–548) was entered on April 30, 1940. Rehearing was denied on June 20, 1940 (R. 548–549). The petition for writ of certiorari was filed on July 8, 1940. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Petitioner employs persons to operate a feed lot and feed mill which adjoin its packing plant and which are used for fattening livestock preparatory to slaughter; a major part of the fattened livestock is slaughtered and processed at the packing plant. The question is whether these persons are included within the exemption of an "agricultural laborer" under Section 2 (3) of the National Labor Relations Act.

STATUTE INVOLVED

Section 2 (3) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include *any individual employed as an agricultural laborer,* or in the domestic service of any family or person at his home, or any

individual employed by his parent or spouse. [Italics supplied.]

STATEMENT

The pertinent facts, as found by the Board[1] and as shown by the evidence, may be summarized as follows:[2]

Petitioner is engaged in the purchase, feeding, and slaughtering of livestock and in the processing and marketing of meat products and various by-products (R. 67–68; R. 110–113, 187–188). The present case concerns persons engaged in the preparation of feed and the feeding of cattle at a feed mill and feed lots maintained by petitioner immediately adjacent to its packing plant (R. 68–69; R. 215). The function of the feed mill and lots is to fatten for slaughter cattle purchased full-grown by petitioner (R. 69–70; R. 189, 213–223, 247, 248). During the year 1936 some 60 per cent of the ani-

[1] The Board issued its findings of fact, conclusions of law, and order (R. 61–108), after the usual proceedings pursuant to Section 10 of the National Labor Relations Act, *i. e.:* amended charge (R. 8–11), complaint (R. 11–19, 109–110), a copy of which was served upon the Tovrea Employees Association, a labor organization alleged in the complaint to be company-dominated, answer (R. 21–23), motion by the Association to intervene and order granting the motion (R. 23–27), hearing before a Trial Examiner, Intermediate Report of the Examiner (R. 28–61), exceptions thereto by petitioner, oral argument, and the filing of briefs before the Board (R. 67).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

mals fattened at the plant feed lots were slaughtered and processed at petitioner's plant; the remainder were shipped elsewhere for slaughter (R. 70; R. 422). While different employees and foremen are utilized, the plant and the adjoining feed lots are both under the direction of petitioner's general manager[3] (R. 70; R. 232–233, 412). Petitioner also maintains four feed ranches, not adjacent to the plant (R. 189–190); only a small proportion of the cattle slaughtered at the plant is fattened on these ranches.[4]

The Board found that the feed lots and mill were maintained "as an incident to and as a part of" petitioner's packing house operations and that the employees' work was "incidental to the commercial activities of * * * [petitioner] carried on at its packing plant, rather than incidental to ranching operations" (R. 70, 72). It therefore rejected petitioner's contention that the feed lot and mill employees were within the "agricultural laborer" exemption under Section 2 (3) of the

[3] The evidence also shows that the same machine shop is used to service and repair both the feed mill and feed lot machinery and equipment and the machinery inside the packing plant itself (R. 252). Carpentry repair work is also handled as a unit (R. 521).

[4] In 1937, about 54 per cent of the cattle slaughtered at petitioner's plant came from its own feed lots, including those adjacent to the plant and those maintained by petitioner on its ranches (R. 70; R. 189–190). Since 51 per cent of all the cattle slaughtered were fattened at the feed lots adjoining the plant (R. 233), only 3 per cent came from petitioner's other feed lots.

Act. The Board ordered petitioner to cease and desist from certain unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act and to take certain affirmative action found appropriate to effectuate the policies of the Act.[5] On August 5, 1939, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 496–502). On April 30, 1940, the court handed down its opinion (R. 532–543) and entered a decree (R. 544–548) enforcing the Board's order except for the provision requiring petitioner to reimburse governmental relief agencies for payments made by those agencies to the employees discriminatorily discharged. On June 20, 1940, the court denied a petition for rehearing filed by petitioner (R. 548–549).

[5] The Board found that petitioner had illegally discriminated against nine of the feed mill and feed lot employees, had interfered with, dominated, and supported the Association, a labor organization admitting to membership all employees at the packing plant, and had restrained and coerced its employees in the exercise of their rights of self-organization and collective bargaining (R. 73–99, 104–105). The Board's order required petitioner to cease and desist from giving effect to its contract with the Association, as well as from its unfair labor practices; to withdraw recognition from and disestablish the Association as a bargaining representative of the employees; to offer reinstatement with back pay to the nine employees discriminated against; to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the nine employees on work-relief projects; and to post appropriate notices (R. 105–108). The order dismissed the complaint as to 16 other employees, as well as with respect

ARGUMENT

1. The Board found that the work of the persons employed at the feed mill and lots adjoining petitioner's plant is incidental to and a part of petitioner's packing-house operations—an admittedly industrial enterprise.[6] Since these findings have the requisite support (*supra,* pp. 3–4), there can be little question but that the workers in question are not within the exemption of an "agricultural laborer" under Section 2 (3) of the Act. See *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 257–259. The holding below that the Board's findings are adequately supported raises no question of general importance.[7]

2. The court below held (R. 536) that the "nature of the work" done by an employee is not

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to allegations that petitioner had refused to bargain collectively in violation of Section 8 (5) of the Act (R. 108).

[6] The petition apparently concedes that the services of the employees were rendered "in proximity to and as an incident to an industrial operation" (Pet. 5, 8, 13).

[7] Petitioner's attempt (Pet. 5, 13–14) to break down the persuasive combination of circumstances upon which the Board and the court below relied and to interpret the decision below as a holding that the "agricultural laborer" exemption would not apply whenever a normally agricultural pursuit is carried on either in close proximity to an industrial plant which utilizes its product or for an employer principally engaged in industry, appears to be but the common effort to overcome a reasonably clear application of the Act by the "simple and familiar dialectic of suggesting doubtful and extreme cases." *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467.

alone decisive upon the question whether he is an "agricultural laborer," and that the nature of the enterprise must also be considered. The decision is in accord with the available indications of the intent of Congress,[8] is not in conflict with any other decision,[9] and is plainly correct: the cannery em-

[8] The Social Security Act, as passed in 1935, exempted "agricultural labor" (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., Supp. IV, Secs. 410, 1011, 1107). In the reports of the legislative committees upon the proposed 1939 amendments to the Social Security Act, it is stated that "under existing law" the feeding of livestock is agricultural labor "only if performed in the employ of the owner or tenant of the farm" on which it is performed. Senate Report No. 734, 76th Cong., 1st Sess., p. 62; House Report No. 728, 76th Cong., 1st Sess., p. 51. While Congress, in adopting amendments in 1939 which broadened the Social Security Act "agricultural labor" exemption, was concerned with problems of tax collection, etc., which are not applicable under the National Labor Relations Act, it is worthy of note that the exemption was not extended to workers such as those involved in the present case. The amendments define "agricultural labor" as services performed "On a farm * * * including the * * * feeding * * * and management of livestock". Act of August 10, 1939, c. 666, 53 Stat. 1360, Sec. 209 (l) (1). Again, in the Fair Labor Standards Act of 1938, agricultural labor is defined as services "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations". Act of June 25, 1938, c. 676, 52 Stat. 1060, Sec. 3 (f).

[9] While petitioner asserts (Pet. 5, 12–13) that the decision below "is contrary to every judicial interpretation" of the term "agricultural laborer," no conflicting decision is cited and we know of none. The decisions cited by petitioner attach weight, as petitioner itself states (Pet. 8), to the "nature of the enterprise" as well as to the nature of the work. Other decisions have subordinated the character of

ployee who picks out spoiled fruit and vegetables after delivery to the cannery performs the same task as a helper on a farm, but his employment is clearly industrial in nature. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. C. A. 9th), certiorari denied, No. 853, last Term.

3. The asserted "misstatements of the record" by the court below (Pet. 10–12) are not misstatements and, in any event, are not important. The court's statement (R. 535) that most of the cattle fattened on petitioner's four feeding ranches are not slaughtered at the plant, is supported by a simple mathematical calculation showing that only 3 percent of the cattle coming to the plant are sent from those ranches (note 4, p. 4, *supra*). Nor is it significant that the court did not explain that 40 percent of the cattle fattened at the feed lots adjoining the plant are shipped elsewhere for slaughter; the primary function of the feed lots

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the work to the nature of the enterprise as a criterion. *Boyer* v. *Boyer*, 178 Minn. 512, 227 N. W. 661; *Nace* v. *Industrial Commission*, 217 Wis. 267, 258 N. W. 781; *Maryland Casualty Co.* v. *Dobbs*, 128 Tex. 547, 100 S. W. (2d) 349; *Roush* v. *Heffelbower*, 225 Mich. 664, 196 N. W. 185; *Industrial Commission* v. *Shadowen*, 68 Colo. 69, 187 Pac. 926; *Great Western Mushroom Co.* v. *Industrial Commission*, 82 P. (2d) 751 (Colo.); *Ganzer* v. *Chapman & Barnard*, 157 Okla. 99, 11 P. (2d) 115; *Rumley* v. *Rio Grande Conservancy Dist.*, 40 N. M. 183; 57 P. (2d) 283; *Klein* v. *McCleary*, 192 N. W. 106 (Minn.).

and mill here involved is to fatten cattle for slaughter and processing at petitioner's own plant.[10]

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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[10] It is, in any event, doubtful that the employees would be "agricultural laborers" if none of the cattle were slaughtered at the plant: "Labor performed by an employee for a commercial feeding concern, a livestock commission company or stockyards concern, feeding or raising livestock as a part of commercial operations in the purchase and sale of livestock, would be employment subject to the [Social Security] Act." Montana Unemployment Compensation Commission, *Official Interpretation No. 25* (of the Social Security Act) (Nov. 1937).

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